83-31

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

PARI-MUTUEL CLERKS UNION OF LOUISIANA, LOCAL 328
Affiliated with
The Service Employees International Union, AFL-CIO

versus

FAIR GROUNDS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BALDWIN & HASPEL
H. SLOAN McCLOSKEY
JAMES P. MAGEE
24th Floor, 225 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-1711

COUNSEL FOR PETITIONERS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. Does the Decision by the National Labor Relations Board (NLRB), the Federal Agency Primarily Entrusted by Congress to Effectuate the Policies of the Labor Management Relations Act (LMRA), Not To Assert Its Jurisdiction Over the Horse Racing Industry, Preclude the District Court From Having Subject Matter Jurisdiction Over This Action Under § 301 of LMRA?

LISTING OF ALL PARTIES TO THE PROCEEDING PURSUANT TO RULE 28.1

1. Pari-Mutuel Clerks Union of Louisiana, Local 328, affiliated with the Service Employer's International Union, AFL-CIO and its officers.

2. All employees represented by unions at the Fairgrounds Corporation, including Leslie Davis and Joseph Greco.

3. Mitchel Ledet.

4. Alvin Sontag.

5. Victor Bussie.

6. Carroll Delatte.

7. Roma D. Bertucci.

8. Louie J. Roussel, III.

9. Fairgrounds Corporation, Inc.

10. Joseph P. Dorignac.

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IN THE
SUPREME COURT OF THE UNITED STATES

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PARI-MUTUEL CLERKS UNION OF LOUISIANA,
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Respondent,

versus

FAIR GROUNDS CORPORATION
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Fair Grounds Corporation, requests that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on April 25, 1983 is located in Appendix A, *infra*.

The judgment rendered by the United States

District Court for the Eastern District of Louisiana was rendered on March 24, 1982 (Appendix A, *infra*). Oral reasons were assigned by the Honorable Lansing L. Mitchell and transcribed by the official court reporter (see Appendix A, *infra*) for the United States Court for the Eastern District of Louisiana.

JURISDICTION

(i) The decision of the United States Court of Appeals for the Fifth Circuit of which petitioners seek review was rendered on April 25, 1983.

(ii) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1) (1966).

PROVISIONS CONSTRUED:

29 U.S.C. §185(A) (1983).

(a) Suite for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district in the United States having jurisdiction of the parties, without respect the amount in controversy or with that regard to the citizenship of the parties.

29 U.S.C. §164(c)(1) (1978).

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor

dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

STATEMENT OF THE CASE

On August 19, 1981, the Pari-Mutuel Clerks Union of Louisiana, Local 328, affiliated with the Service Employees International Union, AFL-CIO (hereafter "the Union") filed an action against the Fair Grounds Corporation seeking, under § 301 of the Labor Management Relations Act (hereafter "LMRA"), 29 U.S.C. § 185 (1983), to enforce two arbitration awards. This complaint was served upon defendant-appellee on August 19, 1981, and the defendant's answer was filed September 18, 1981. Thereafter, a status conference was held before Magistrate M. Livaudais, whose minute entry of December 8, 1981, reflects the parties' agreement that the matter would be resolved by cross motions for summary judgment, to be filed within 60 days of that date.

Accordingly, defendant's motion for summary judgment was filed on January 8, 1982, and plaintiff's opposition thereto, together with the plaintiff's cross motion for summary judgment, was filed on February 2, 1982, after the district court had granted an extension of time within which such pleadings were to be filed. On March 24, 1982, the Court did hear oral argument on defendant's motion for summary judgment, based entirely on the jurisdictional question rather than the merits, and the Court ruled in defendant's favor. Judgment was rendered on March 25, 1982, dismissing plaintiff's suit. Judge Lansing L. Mitchell

did render his decision from the bench at the time of oral argument, and his findings are part of the record.

From this judgment, the plaintiff-appellant filed an appeal to the United States Court of Appeals for the Fifth Circuit. On April 24, 1983, the Fifth Circuit reversed the Trial Court and held that the District Court's grant of Summary Judgment in favor of the petitioners was in error. The Fifth Circuit ordered that this cause be remanded to the District Court for further proceedings.

As a result of the judgment rendered by the United States Court of Appeals for the Fifth Circuit, the petitioner, Fair Grounds Corporation, has timely petitioned this Honorable Court for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THIS WRIT

I.
PRELIMINARY SUMMARY

Special and important reasons call for the issuance of a writ of certiorari in this case (Rule 17). The Court of Appeals' decision, asserting that the District Court erred in holding that the District Court had a lack of subject matter jurisdiction is in conflict with the decisions of the majority of the courts in the federal system.

II.
THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION UNDER § 301 OF THE LMRA

The central and sole issue before the Court is whether

the Defendant, Fair Grounds Corporation, a corporation involved in the horse racing business, "affects commerce" within the meaning of § 301 of the LMRA. The Defendant urges this Court to reverse the United States Court of Appeal for the Fifth Circuit and affirm the District Court's granting of the Motion for Summary Judgment in favor of Defendant, Fair Grounds Corporation, holding that the District Court did not have subject matter jurisdication over the Defendant under § 301 of the LMRA.

Section 14(c)(1) of the LMRA empowers the NLRB to set standards governing the enforcement of the National Labor Relations Act. *See* 29 U.S.C. § 164(c)(1) (1978). Pursuant to this Congressional authorization, the NLRB developed Rule 103.3 which specifically declines to assert jurisdiction over labor disputes within the horse racing industry. *See* 29 C.F.R. § 103.3 (1982).

In the litigation before this Court, the District Court held that the NLRB's election not to assert jurisdiction pursuant to § 103.3 of the NLRB Rules and Regulations precludes the exercise of jurisdiction by the District Court. The majority of the federal courts throughout the United States are consistent with the holding of the District Court in this issue.

The case of *Independent Association of Pari-Mutuel Employees of the State of Florida v. Gulf Stream Park Racing Association*, 407 F.Supp. 855 (S.D. Fla. 1976), directly decides the issue before this Court. The Court in *Gulf Stream*, after reviewing the policy reasons that prompted the NLRB ruling to decline jurisdiction over the horse racing industry, held:

The Board therefore found it would not effectuate

> the policies of the Act to assert jurisdiction over these industries...
>
> Given this frame of reference, the Court agrees with the defendant's position. If the Court were to make an independent determination as to this particular track as the plaintiff urges, we should only be forced to consider the same factors which led to the Board's conclusion that racing tracks do not affect commerce. The Court finds it best to yield to the expertise of the Board in agreeing that the horse racing industry is an industry of essentially local concern.

Gulfstream, supra, at p. 857.

The latest expression from the federal system on this issue comes from the United States District Court in Puerto Rico. In *San Juan Racing Association v. Labor Relations Board of Puerto Rico,* 532 F.Supp. 51 (D. P.R. 1982), decided on January 27, 1982, the Court was faced with a petition for removal of a suit based on alleged violations of a collective bargaining agreement between the employer and his employees. As in *Gulf Stream,* the issue became whether the District Court had jurisdiction under § 301 of the LMRA. The Court held

> The Court finds it best to defer to the expertise of the Board when they concluded that the horse racing industry is an industry of local concern, that the industry is subject to extensive state regulations, and furthermore the state courts are empowered with jurisdiction over labor disputes arising within it.

San Juan, supra, at p. 51.

As a result, in declining to assert jurisdiction under § 301 of the LMRA, the majority of the district courts in the federal system have realized that the Board, through its cumulative expertise in dealing with labor-management relations in a variety of industrial and non-industrial backgrounds, has developed the expertise to determine whether the assertions of jurisdiction would further the objectives of the Act. Because of such expertise, the Courts have and should defer to the NLRB's determination that this industry does not have a substantial effect on interstate commerce so as to warrant the exercise of jurisdiction over it. *See Gulf Stream, supra,* at p. 856. *See also, San Juan Racing Association, supra,* at p. 53. This Court on a number of occasions has recognized that Congress primarily committed to the NLRB the difficult responsibilities to effectuate the National Labor Relations Act's policy subject to a very limited review. *See Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501 (1978).

If the Fifth Circuit's decision is upheld and jurisdiction is asserted over the horse racing industry under § 301 of the LMRA, the federal court will permanently alter the decision-making and enforcement structure of the NLRB contrary to the mandate of Congress. Because of the judicial redetermination of the ambit of § 301 of the LMRA, the NLRB will be faced with the possibility of extending its limited resources to a limitless number of potential minor labor disputes, essentially contractual in nature, to insure the policies of the LMRA are effectuated. Therefore, these actions may force the NLRB to give less attention to those matters more within the scope of the NLRB and thereby weakening the enforcement mechanism of the NLRB. Because of the possibility of the above described scenario, federal courts have held that district courts should not assume jurisdiction when such an assumption would impinge

on the province of the Board, *Local Union No. 20 IBEW v. IEEW*, 197 F.Supp. 99 (D. Md. 1961).

This issue presently before the Court centers around the very nature of judicial power in our system of federalism. The Fifth Circuit's rationale in holding that a district court has jurisdiction under § 301(a) of the LMRA to entertain an action for breach of a collective bargaining agreement involving the horse racing industry is as follows:

> Because of federal court's jurisdiction over such matters independent of that of the NLRB, it is unaffected by the NLRB's decision to decline jurisdiction. So long as the statutory requirements of § 301 are satisfied, a federal court must exercise the authority granted by that section to hear labor contract disputes. (Citation omitted.) (Footnote omitted.)

Such a conclusion by the Fifth Circuit is erroneous since it conflicts with the very nature of the judicial power of the federal courts throughout the United States. A fundamental precept in defining the nature of the judicial power of the federal court is that the federal courts are courts of *limited jurisdiction* and therefore can exercise jurisdiction only when the United States Constitution or Congress constitutionally authorizes the assertion of such jurisdiction. Hence, the very nature of the judicial power of the federal courts as embodied in the United States Constitution supports the contention that § 301 of the LMRA should be narrowly construed and deference be given to the NLRB's decision not to assert jurisdiction over labor disputes in the horse racing industry. It is clear that Congress intended that the NLRB be entrusted with the effectuation of the policies of the LMRA and not the federal courts.

Additionally, the courts have on numerous occasions failed to exercise jurisdiction even though the statutory or constitutional requirements have been met. This practice of judicial restraint has frequently been called the "abstention doctrine."

The above stated doctrine is clearly supported in *Buford v. Sun Oil Co.*, 319 U.S. 315 (1943) where this Court held that a federal court should defer to the state court adjudication of certain matters in order to avoid needless conflict with the administration of a state in its own affairs. Again, in *Burford*, the federal court *did* have jurisdiction but was not obligated to exercise the authority granted by the particular jurisdictional statute. Hence, this Court in *Burford* declined to exercise jurisdiction.

The petitioner contends that the Louisiana's state court provides the appropriate forum for the resolution of these labor disputes, essentially contractual in nature, within the horse racing industry, because Louisiana has a large financial stake in the industry and regulates it extensively. Petitioner asserts that the District Court's dismissal of the Union's cause of action was a conscious deferral to the Louisiana state courts.

The Fifth Circuit stated in its opinion that the *Burford* doctrine did not apply. The Court reasoned that even if the Union had filed this § 301 action in Louisiana state court, the Louisiana court would have been bound to apply the principles of federal labor law created by the federal courts. State courts have on numerous occasions applied federal law regarding similar litigation. For example, prior to the recent congressional amendment, the disputes under $10,000 arising under the laws of the United States were heard by state courts applying federal law. Additionally,

this Court has explicitly held that the state court has concurrent jurisdiction under § 301 of the LMRA. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Hence, the mere fact that a state court has to apply the federal labor law is not a relevant consideration.

The Fifth Circuit decision, in refusing to allow the district court to defer to the state court, in effect grants exclusive jurisdiction of these disputes in the federal courts. If Congress intended § 301(a) to be heard *exclusively* by federal courts, it could have placed such a requirement in the statute. Hence, the entire rationale of the Fifth Circuit in failing to apply the *Burford* doctrine is erroneous. The state courts are willing to apply federal substantive labor law in a state court proceeding. It should be noted that in this dispute presently before the court, is *essentially contractual in nature.* Hence, a state court would be just as competent to hear this litigation as the federal court. Hence, the *Burford* rationale should apply and the federal court should defer to the state court adjudication of this dispute.

CONCLUSION

The petitioner asserts that the District Court in reliance upon the determination by National Labor Relations Board (NLRB) that the horse racing industry does not substantially affect interstate commerce was correct in holding that the plaintiff's petition filed in federal court should be dismissed since the federal court lacks jurisdiction under § 301 of the Labor Management Relations Act. The LMRA is primarily vested by Congress with the power to administer and enforce the provisions of the LMRA. Pursuant to this authorization from Congress, the NLRB has specifically declined to assert jurisdiction over the

horse racing industry. If jurisdiction was asserted by federal court under § 301 of the LMRA, such an action may undermine the enforcement mechanism of the NLRB and totally ignore the expertise of the NLRB as developed in determining the effect the industry will have on the enforcement policies of the LMRA. Finally, the NLRB and the federal courts, when presented with the same issue that is before this Honorable Court, have recognized the close relationships that the states and their regulatory agencies have develped with the horse racing industry, and have held that the state courts are the proper form to litigate these matters since the litigation may impinge upon the state's regulatory policy.

Respectfully submitted:

H. SLOAN McCLOSKEY
JAMES P. MAGEE
BALDWIN & HASPEL
24th Floor, 225 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-1711

Attorneys for Petitioner,
Fair Grounds Corporation

CERTIFICATE OF SERVICE

I. H. SLOAN McCLOSKEY, hereby certify that I have on June 22 1983, by United States Mail, postage prepaid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

Pari-Mutuel Clerks Union of Louisiana
Local 328, Affiliated With the
Service Employees International Union AFL-CIO
through their counsel of record

Marie Healey
Barker, Monroe, Lowry
1400 Richards Building
837 Gravier Street
New Orleans, La. 70112

H. SLOAN McCLOSKEY

APPENDIX "A"

PARI MUTUEL CLERKS UNION OF LOUISIANA, LOCAL 328 affiliated with the Service Employees International Union, AFL-CIO, Plaintiff-Appellant,

v.

FAIR GROUNDS CORPORATION, Defendant-Appellee.

No. 82-3259.

United States Court of Appeals, Fifth Circuit.

April 25, 1983.

Union representing certain employees of Louisiana horse-racing track brought action seeking to force track to comply with arbitration awards on behalf of two union members. The United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, J., refused to exercise its own jurisdiction over action and granted summary judgment for track. Union appealed. The Court of Appeals, Goldberg, Circuit Judge, held that in view of track's attraction of patrons, horses, and jockeys from many states across the country, track's operation of food service facilities which sold food products presumably produced, processed, and manufactured outside Louisiana, and track's lease of essential racing equipment from a Maryland corporation, the track and union were engaged in "industry affecting commerce" within meaning of jurisdictional section of Labor Management Relations Act, so that federal district court had jurisdiction to hear dispute arising out of collective bargaining agreement between union

and track, even though National Relations Board had declined to exercise jurisdiction over dispute on grounds that horse-racing industry in Louisiana was a matter of local concern.

Reversed and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

GOLDBERG, Circuit Judge:

This is a jurisdictional claiming race with a novel twist: no forum has come forward to claim the cause of action. Appellant Pari-Mutuel Clerks Union of Louisiana Local 328 ("Union"), seeking to enforce certain arbitration awards, filed suit against appellee Fair Grounds Corp. ("Fair Grounds") under section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1976). The district court observed that the National Labor Relations Board ("NLRB") has declined to exercise its discretionary jurisdiction over the horseracing industry, *see id.* § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976); 29 C.F.R. § 103.3 (1982). Persuaded that it should defer to the NLRB's expertise, the district court refused to exercise its own jurisdiction over the action and granted summary judgment for Fair Grounds. The Union, jockeying for a federal forum, now appeals. We reverse and remand.

I. AND THEY'RE OFF ....

A. Facts

The Union is an unincorporated labor organization serving as the recognized collective bargaining representative for a unit of employees at the Fair Grounds Race Track ("Race Track"), a racing enterprise operated by appellee Fair Grounds. Union members sell and cash betting tickets at the Race Track and operate the equipment that tabulates and calculates the bets placed.

The Race Track is open for horseracing and betting for up to 105 days per year. The facility is nationally known, and it draws patrons from across the United States and around the world. Ticket sales average over $1 million per day of track operation.

The horses that run at the Race Track are raised and bred in Arkansas, Florida, Illinois, Kentucky, Louisiana, Maryland, New Jersey, New York, and Ohio. The Race Track pays approximately $10 million per year in prize money to horse owners in these various states. Similarly, many of the jockeys who ride at the Race Track reside in states other than Louisiana. In addition, horses and jockeys who appear at the Race Track also appear at race tracks in other states at different times throughout the racing season.

Fair Grounds operates twenty-six concession stands and bars at the Race Track, which sell hot dogs, hamburgers, popcorn, cigarettes, soft drinks, and liquor, as well as a full-service restaurant. Fair Grounds leases its racing equipment from American Totalisator Co. ("Amtote"), a Maryland corporation. Amtote leases similar equipment to other race tracks across the country where pari-mutuel betting is permitted. The Amtote equipment is transferred

from track to track as they open and close.

The Union and Fair Grounds are parties to a collective bargaining agreement governing the wages, hours, and working conditions of Union members. The agreement creates an elaborate grievance and arbitration procedure, pursuant to which a special arbitration committee has been established. On April 6, 1981, the arbitration committee rendered awards on behalf of two Union members. Fair Grounds refused to comply with the awards, and this litigation followed.

B. Proceedings Below

The gun sounded in this litigation on August 19, 1981. The Union was first out of the gate, filing its complaint against Fair Grounds in the United States District Court for the Eastern District of Louisiana. The complaint sought to enforce two arbitration awards under section 301(a) of the LMRA, 28 U.S.C. § 185(a) (1976). Fair Grounds, coming up on the outside, filed its motion for summary judgment on January 8, 1982. Following oral argument on the motion, the district court noted that the NLRB has declined to exercise its discretionary jurisdiction over the horseracing industry. The court then determined that it "should defer to the expertise of the [NLRB] and hold that horseracing is an industry of essentially local concern." Record on Appeal, Vol. II at 11. Consequently, the court granted summary judgment in favor of Fair Grounds and dismissed the Union's action. Having lost the first half of the jurisdictional daily double, the Union now appeals to this court.

II. INTO THE FIRST TURN: ISSUES ON APPEAL

Following the lead of the NLRB, which has declined to assert jurisdiction over the horseracing industry pursuant tc the statutory authority granted by LMRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976), the district court refused to take jurisdiction of the Union's cause of action against Fair Grounds. On appeal, the Union urges that the district court erred in dismissing its cause of action. In particular, the Union argues that federal courts must exercise the statutory jurisdictional authority granted by section 301(a) of the LMRA, 29 U.S.C. § 185(a) (1976), when the requirements of that statute are met. The Union further asserts that the district court should not have deferred to the NLRB's decision declining jurisdiction over the horseracing industry. Finally, the Union claims that horseracing is an "industry affecting commerce" within the meaning of section 301(a). We now turn to an appraisal of these arguments.

III. INTO THE STRETCH

A. The Back Stretch: The District Court's Jurisdiction

Section 301(a) of the LMRA, which gives the federal courts jurisdiction over disputes involving collective bargaining agreements, is the starting gate for our discussion. That section provides:

> *Suits for violation of contracts* between an employer and a labor organization representing employees in an *industry affecting commerce* as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of

the parties.

LMRA § 301(a), 29 U.S.C. § 185(a) (1976) (emphasis added). "The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." *Id.* § 501(1), 29 U.S.C. § 142(1) (1976).

The jurisdiction of the NLRB is differently circumscribed. Under the National Labor Relations Act ("NLRA") § 10(a), 29 U.S.C. 160(a) (1976), the NLRB "is empowered ... to prevent any person from engaging in any *unfair labor practice ... affecting commerce*" (emphasis added). Section 2(7) of the NLRA, 29 U.S.C. § 152(7) (1976), defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

In its discretion, the NLRB may decline to exercise its jurisdiction where it has determined that "the *effect* of such labor dispute *on commerce is not sufficiently substantial* to warrant the exercise of its jurisdiction." LMRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976) (emphasis added). Pursuant to this statutory authority, the NLRB has consistently declined to exercise its jurisdiction with regard to the horseracing and dogracing industries.[1] As a reflection

[1] For the first fifteen years of its existence, the NLRB determined on a case by case basis whether or not to assume jurisdiction in a particular dispute. In 1950, this practice was replaced with a series of standards to determine whether the NLRB would assume jurisdiction over a specific industry. *San Juan Racing Ass'n v. Labor Relations Bd.*, 532 F.Supp. 51, 53 (D.P.R.1982). Basically, the NLRB limited its jurisdiction by setting certain minimum dollar volumes of business and exempting certain "essentially local" businesses. during this period the NLRB

of this general policy, the NLRB has adopted a rule stating that it "will not assert its jurisdiction in any proceeding under section 8, 9, and 10 of the [NLRA] involving the horseracing and dogracing industries." 29 C.F.R. § 103.3 (1982).[2] As a result, all racing industry employees are scratched from entry into the NLRB's field.

(Footnote 1 continued)
declined to assert jurisdiction over horseracing and dogracing and related industries. *See IBEW Local 1501 v. American Totalisator Co.*, 529 F.Supp. 419, 420 (D.Md.1982); *Los Angeles Turf Club, Inc.*, 26 L.R.R.M. (BNA) 1145 (1950).

In 1957 and 1958 the Supreme Court held that the NLRB could not refuse to exercise jurisdiction over entire classes of employers. *See Hotel Employees Local 255 v. Leedom*, 358 U.S. 99, 79 S.Ct. 150, 3 L.Ed.2d 143 (1958); *Office Employers Int'l Union Local 11 v. NLRB*, 353 U.S. 313, 77 S.Ct. 799, 1 L.Ed.2d 846 (1957). Congress then amended the National Labor Relations Act to codify the NLRB's authority to continue to decline jurisdiction, enacting what is now 29 U.S.C. § 164(c)(1). *See* Pub.L. No. 86-257, § 701(a), 73 Stat. 519, 541 (1959). Since 1959 the NLRB has continued its refusal to take jurisdiction over labor disputes arising in the horseracing and dogracing industries. *See, e.g., Yonkers Raceway, Inc.*, 79 L.R.R.M. (BNA) 1697 (1972); *Walter A. Kelley*, 51 L.R.R.M. (BNA) 1375 (1962); *Hialeah Race Course, Inc.*, 45 L.R.R.M. (BNA) 1106 (1959).

[2] The NLRB's rationale for declining to assert jurisdiction over the racing industry is that racing operations are so essentially local in character that a labor dispute therein would be unlikely to disrupt interstate commerce. The NLRB views regulation of racing industry labor matters as an area best left to the states, because race tracks are subject to detailed state regulation that could be extended to include labor relations. *See San Juan racing Ass'n*, 532 F.Supp. at 54; *Independent Ass'n of Pari-Mutuel Employees v. Gulfstream Park Racing Ass'n*, 407 F.Supp. 855, 856 (S.D.Fla.1976).

We note that one court recently has held that, in promulgating Rule 103.3, 29 C.F.R. § 103.3 (1982), the NLRB failed to conduct the requisite inquiry into the volume of commerce affected by labor disputes in the racing industry. *New York Racing Ass'n v. NLRB*, 110 L.R.R.M. (BNA) 3177, 3183 (E.D.N.Y.1982). The NLRB's decision declining jurisdiction over the New York Racing Association was remanded for reconsideration. *Id.* at 3183.

In the instant case, the district court yielded to the NLRB's expertise and accepted the view that horseracing is an industry of essentially local concern. Because the parties to the litigation are engaged in horseracing, the district court determined that it did not have jurisdiction to entertain this action and granted summary judgment for Fair Grounds. The Union now urges that this dismissal was in error, contending that the cause of action clearly was within the court's jurisdiction under section 301(a) of the LMRA, 29 U.S.C. § 185(a) (1976), and that the court acted improperly in deferring to the NLRB. We agree with the Union's position.

The LMRA establishes two primary mechanisms for promoting the goal of industrial stability: private enforcement of collective bargaining agreements through section 301 and government sanctions for unfair labor practices through the NLRB. *See American Totalisator*, 529 F.Supp. at 421. These mechanisms are merely alternative routes to the same destination—the goal of peaceful resolution of labor-related matters. These alternate routes are independent means for achieving the same end, but they are not mutually exclusive. *See id.* at 422. For example, federal courts have jurisdiction under LMRA section 301 to resolve disputes involving alleged breaches of collective bargaining agreements, even though the breach may also constitute an unfair labor practice. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976). The existence of a remedy before the NLRB does not bar a suit for damages for breach of a collective bargaining agreement in the federal courts under section 301. *Carey v. Westinghouse*, 375 U.S. 261, 268, 84 S.Ct. 401, 407, 11 L.Ed.2d 320 (1964); *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 517 (1982); *International Union v. E-Systems, Inc.*, 632 F.2d 487, 490

(5th Cir.1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1979, 68 L.Ed.2d 298 (1981). Thus, it has been held that the preemption doctrine,[3] which requires that federal courts defer to the exclusive competence of the NLRB, is "not relevant" to actions brought under section 301 of the LMRA. *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101 n. 9, 82 S.Ct. 571, 575 n. 9, 7 L.Ed.2d 593 (1962). When a challenged activity constitutes a breach of a collective bargaining agreement, the NLRB's authority "is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Smith v. Evening News Association*, 371 U.S. 195, 197, 83 S.Ct. 267, 268, 9 L.Ed.2d 246 (1962). In enacting section 301, Congress intended to provide the parties to a labor contract with an independent forum as an alternative to government enforcement by the NLRB. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508-513, 82 S.Ct. 519, 523-525, 7 L.Ed.2d 483 (1962). Consequently, a party seeking to enforce a collective bargaining agreement has a choice of forums: the courts or the NLRB.

Thus, when breach of a collective bargaining agreement constitutes an unfair labor practice, the court's jurisdiction to entertain the dispute overlaps with the jurisdiction of the NLRB. It does not follow, however, that the jurisdictions of these two enforcement schemes are congruent. As noted earlier, the key phrase in Congress' grants of jurisdiction to both the courts and the NLRB is "affecting commerce." The courts' jurisdiction covers

[3] When an activity arguably falls within section 7 (right to organize and bargain collectively) or section 8 (unfair labor practices) of the National Labor Relations Act, 29 U.S.C. §§ 157, 158 (1976), the preemption doctrine teaches that ordinarily "the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959).

suits for "violations of contracts ... in an industry affecting commerce." LMRA § 301(a), 29 U.S.C. § 185(a) (1976). The jurisdiction of the NLRB extends to "unfair labor practices ... affecting commerce." NLRA § 10(a), 29 U.S.C. § 160(a) (1976). Significantly, the NLRB also has discretion to decline to exercise its jurisdiction if it determines that a particular dispute does not have a "sufficiently substantial" effect on commerce. LMRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976). As the *American Totalisator* court noted:

> Equating a court's jurisdiction with the permissible outer limits of NLRB jurisdiction is justified since the outer limits of the agency's jurisdiction and of the court's jurisdiction coincide. Equating a court's jurisdiction with the permissible discretionary exercise of NLRB jurisdiction is not justified under the statute. This is not an instance of a court's deferring to an agency's interpretation of an imprecisely defined statute. *The NLRB is specifically empowered to exercise less than its authorized jurisdiction; this Court is not.*

529 F.Supp. at 421 (emphasis added).

We hold, therefore, that a federal district court has jurisdiction under LMRA § 301(a), 29 U.S.C. § 185(a) (1976), to entertain an action for breach of a collective bargaining agreement, even if the ddispute involves an industry over which the NLRB has declined to exercise jurisdiction. Because a federal court's jurisdiction over such matters is independent of that of the NLRB, it is unaffected by the NLRB's decision to decline jurisdiction. So long as the statutory requirements of section 301 are satisfied,[4] a federal court must exercise the authority

[4] As this court has noted, "[a] section 301 claim must satisfy

granted by that section to hear labor contract disputes. *See Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447 (5th Cir.1983). This result is entirely consistent with the strong Congressional policy, reflected in section 301, favoring judicial enforcement of collective bargaining contracts. As the history of section 301 reflects, "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of law.' " *Dowd Box*, 368 U.S. at 513, 82 S.Ct. at 525. The door to the federal courthouse swings quite wide, and we will not slam it in a litigant's face unless the statute itself mandates such a result. *Accord, American Totalisator*, 529 F.Supp. at 422; *see also Stein v. Mutual Clerks' Guild*, 560 F.2d 486, 490 (1st Cir.1977) (NLRB's declination of jurisdiction over horseracing industry does not bar suit under sections 3 and 102 of Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 402, 412 (1976)). *Contra, San Juan Racing Association v. Labor Relations Board*, 532 F.Supp. 51 (D.P.R.1982) (deferring to NLRB's position and dismissing cause of action under LMRA § 301); *Independent Association of Pari-Mutuel Employees v. Gulfstream Park Racing Association*, 407 F.Supp. 855 (S.D.Fla.1976) (same).

Appellee Fair Grounds cites *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), for the proposition that a federal court should defer to state court adjudication of certain matters in order to avoid needless conflict with the administration by a state of its own affairs. Fair Grounds contends that the Louisiana state

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(Footnote 4 continued)
three requirements: (1) a claim of violation of (2) a contract (3) between an employer and a labor organization." *Pratt-Farnsworth*, 690 F.2d at 500. To these three requirements we would add a fourth: the dispute must concern an "industry affecting commerce" as defined in 29 U.S.C. § 142(1) (1976).

courts provide the appropriate forum for resolution of labor disputes in the horseracing industry, because Louisiana has a large financial stake in the industry and regulates it extensively. Accordingly, Fair Grounds asserts that the district court's dismissal of the Union's cause of action was appropriate as an equitable deferral to the Louisiana state courts.

We believe Fair Grounds' reliance on *Buford* to be misplaced, for *Buford* involved concerns of federal-state comity not presented in the case at bar. Although Louisiana regulates extensively the operationsof the horseracing industry, *see* La.Rev.Stat.Ann. §§ 141-197 (West Supp. 1983), this state regulation does not encompass labor relations in that industry. Because Louisiana has no legislation governing labor relations in the horseracing industry, a party seeking to enforce a collective bargaining agreement in a Louisiana state court would have to rely upon section 301(a) of the LMRA as support for a cause of action.[5] An action brought under section 301 is controlled by federal substantive labor law even if it is brought in state court. *Humphrey v. Moore*, 375 U.S. 335, 343-44, 84 S.Ct. 363, 368-369, 11 L.Ed.2d 370 (1964); *Smith v. Evening News Ass'n*, 371 U.S. at 199, 83 S.Ct. at 269; *Lucas Flour*, 369 U.S. at 102-103, 82 S.Ct. at 576-577. Thus, even if the Union had filed this section 301 action in Louisiana state court, as Fair Grounds suggests, the Louisiana court would have been bound to apply the principles of federal labor law created by the federal courts in the wake of *Textile*

[5] It is a well-established principle that section 301 grants to both federal and state courts the jurisdiction to entertain disputes involving collective bargaining agreements. *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 298, 91 S.Ct. 1909, 1924 [29 L.Ed.2d 473] (1971); *Smith v. Evening News Ass'n*, 371 U.S. at 197-98, [83 S.Ct. at 268-269]; *Lucas Flour*, 369 U.S. at 101 [82 S.Ct. at 575]; *Dowd Box*, 368 U.S. at 507-513 [82 S.Ct. at 522-525].

Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957). It would be inane and illogical to require the federal district court in this case to defer to state court resolution of a labor dispute, when the federal law of labor relations would control the state adjudication. No questions of comity or undue interference with state affairs, such as that presented in *Buford*, exist here, and we reject Fiar Grounds' contention that the district court's dismissal of the Union's cause of action was an appropriate deferral to the state courts.

To summarize, we hold that a federal district court's jurisdiction over contractual labor disputes under section 301(a) of the LMRA is independent of the NLRB's authority to entertain disputes involving unfair labor practices. Accordingly, the NLRB's decision to decline to exercise its jurisdiction over the racing industry in no way limits a federal court's authority to hear a dispute arising from that industry, so long as the statutory requirements of section 301(a) are met. Furthermore, no principles of comity or federalism required the federal court in this case to defer to state court adjudication of the controversy. Thus, we hold that the district court's deferral to the NLRB's decision to decline jurisdiction was improper. There remains, then, only one issue in this case: is horseracing an "industry affecting commerce" within the meaning of sections 301 and 501 of the LMRA?[6]

[6] Under our holding today, the only constraints upon a federal court's jurisdiction over disputes involving collective bargaining agreements are those found in § 301(a) itself. *See supra* note 4. The parties agree that the instant case involves a claim of violation of a contract between an employer and a labor organization; thus, three of the § 301(a) requirements are clearly satisfied. The only question, therefore, concerns the "industry affecting commerce" aspect of the § 301(a) test.

B. The Home Stretch: Is Horseracing an "Industry Affecting Commerce"?

Section 501(1) of the LMRA, 29 U.S.C. § 142(1) (1976), defines the term "industry affecting commerce" as "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." The Race Track attracts patrons, horses, and jockeys from many states across the country. Ticket sales average $1 million per day when the track is in operation, and the track pays over $10 million per year in prizes. This money flows from out-of-state patarons to Fair Grounds and then back to out-of-state horseowners. Fair Grounds operates a number of food service facilities at the Race Track, which sell food products presumably produced, processed, and manufactured outside Louisiana. Essential racing equipment is leased from a Maryland corporation and imported into Louisiana from other states. These undisputed facts reveal that many out-of-state patrons transport themselves across state lines to the Fair Grounds Race Track to find their fortunes reported on the likewise imported totalisator. Despite this factual record, which is admitted by Fair Grounds, the district court determined that it "should defer to the expertise of the [NLRB]" and found that "horseracing is an industry of essentially local concern." Record on Appeal, Vol. II at 11. To the extent that this finding reflects the district court's determination that the horseracing industry does no "affect commerce," our review of the record leaves us with "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Clearly Fair Grounds and the Union are engaged in an "industry affecting commerce," and the district court's finding to

the contrary must be regarded as clearly erroneous. *See New York Racing Association v. NLRB*, 110 L.R.R.M. (BNA) 3177, 3183 (E.D.N.Y. 1982) (noting "overwhelming impact" of horseracing industry on commerce and observing that NLRB regulates industries with far less impact on commerce). Because all the requirements of section 301(a) were satisfied, the district court erred in granting summary judgment for Fair Grounds.

IV. AT THE WIRE

Historically, a litigant has had two possible tracks available in the race for harmonious labor relations: the NLRB as Track #1 or the United States District Court as Track #2. Here the NLRB has denied entry to its track, refusing to hear any matters concerning employees at any racetrack. With only one possible track remaining available, that being the United States District Court, the pari-mutuel clerks in this case sought entry into such court and werre summarily scratched from entering the race. We do not have before us any question regarding Track #1, and we have no intention of disturbing the wisdom and judgment of the National Labor Relations Board. We *do* have before us the task of examining the law regarding entry into Track #2—the United States District Court—for the solution of this labor management problem. While it may be argued that the juridical apertures of the federal courts are very narrow ones, it is also indisputable that once an aperture becomes available it cannot be denied merely because the case is distasteful or difficult. Once jurisdiction is created it is rarely optional. In the case before us, there is no option to be exercised by the district court; this is a case under a statute that plainly places arbitration of collective bargaining agreements within its jurisdictional ambit. Thus, this jurisdictional run for the roses concludes

with appellant Union occupying the winner's circle. Having determined that the district court erred in deferring to the NLRB's decision to decline jurisdiction over the horseracing industry and that horseracing is an "industry affecting commerce" within the intendment of the LMRA, we hold that the district court's grant of summary judgment in favor of Fair Grounds was in error. Accordingly, we reverse the district court and remand this cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PARI-MUTUEL CLERKS OF LOUISIANA, LOCAL 328, AFFILIATED WITH THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO	CIVIL ACTION NO. 81-3379 SECTION "F"

VERSUS

FAIR GROUNDS CORPORATION

JUDGMENT

The Court having granted defendant's Motion for Summary Judgment; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Fair Grounds Corporation, and against plaintiffs, Pari-Mutuel Clerks Union of Louisiana, Local 328, affiliated with the Service Employees International Union, AFL-CIO, dismissing their suit.

New Orleans, Louisiana, this 24th day of March, 1982.

/S/LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HONORABLE LANSING L. MITCHELL,
SENIOR JUDGE
PRESIDING

PARI-MUTUAL CLERKS UNION OF LOUISIANA, LOCAL 328	CIVIL ACTION
VERSUS	NO. 81-3379
FAIR GROUNDS CORPORATION	SECTION "F"

REPORTER'S TRANSCRIPT OF PROCEEDINGS

New Orleans, Louisiana

March 24, 1982

APPEARANCES:

For Plaintiff: BARKER, MONROE, LAMY
By: MARIE HEALEY, ESQ.
Richards Building
New Orleans, Louisiana 70112

For Defendant: BALDWIN & HASPEL
By: SLOAN McCLOSKEY, ESQ.
225 Baronne St., Suite 2411
New Orleans, Louisiana 70112

OFFICIAL COURT REPORTER:
PATRICIA L. McGEE, RPR-CP

NEW ORLEANS, LOUISIANA

WEDNESDAY, MARCH 24, 1982

THE CLERK: In the matter of civil action 81-3379, Pari-Mutual Clerks Union of Louisiana, et cetera, versus the Fair Grounds Corporation.

THE COURT: Proceed.

MR. McCLOSKEY: Your Honor, my name is Sloan McCloskey. I represent the Fair Grounds.

The motion today is one on lack of jurisdiction, I understand.

THE COURT: That's right.

MR. McCLOSKEY: I have nothing to add to my memorandum except, of course, there is no Fifth Circuit decision concerning jurisdiction. But the NLRB has had a lick at this just as little as two years ago and decided they weren't going to set jurisdictional race tracks and there is no mysterious reasons, it's just because the race tracks are supervised by the Racing Commission, as you read so promptly in the newspaper. And the federal government decided for once this is something too closely connected with state regulation, and they were going to stay away from it, and it is not as if the Pari-Mutual Clerks don't have a remedy. They have the same remedy, except it is in State Court and not in Federal Court.

MS. HEALEY: Your Honor, we think it's totally irrelevant—my name is Marie Healey, representing the plaintiffs.

We think it is totally irrelevant what the Board has decided to do. The Board under the statute does indeed have the authority to decline to assert jurisdication over any area which it feels does not have a substantial impact on commerce. However, the jurisdictional requirements of Section 301, which is the statute under which our post faction was filed required only the action be between an employer and labor organization, first of all; and we certainly have that element in here.

And second, that the labor organization must represent employees in an industry affecting commerce and; third, the action be in violation of collective bargaining agreements. And Section 2 is obviously the only element which the defendants could attack in the event of the position that they are taking. But Section 2 of the LMRA, the Labor Management Relations Act defines affecting commerce as anything that tends to burden or obstruct commerce.

Now, the statute allows the National Labor Relations Board to decline jurisdiction, as I just mentioned, in its discretion, if it decides labor disputes will not have a substantial impact on commerce. So the language is different.

We have one that has a substantial impact on commerce, but under the statute that our course of action is right now, the language is whether or not it affects commerce. The Board, in fact, agrees the horse racing does affect commerce, even though it has declined to assert jurisdiction.

Whatever the Board does has nothing to do with what the Court does. The Board cannot control the Federal

Court jurisdiction.

The question has, in fact, already been before another Circuit Court, the First Circuit Court, in a case called Stein vs. Mutual Clerks Guild.

That particular case was under the Labor Management Reporting and Disclosure Act, which has very, very similar jurisdictional language to the LMRA language.

Again, it refers to industries affecting commerce. That Court decided that, first of all, coverage by the Board is not a sine qua non for jurisdiction under LMRA and; secondly, the Board's decision not to assert jurisdiction cannot act to divest jurisdiction of the Federal Courts as to jurisdiction granted by the LMRA and; thirdly, the bottom line conclusion was that the horse racing industry does indeed affect commerce and it did assert jurisdiction.

Your Honor, we have presented an affidavit by the president of the Pari-Mutual Clerks attesting to the kind of elements that are present, tending to show that the horse racing industry does affect commerce. These affidavits have not been controverted by the defendants, not rebutted in any way, nor have our facts been disputed.

Those affidavits allege that the horses and riders that are used at the fair grounds, the horses that are used at the fair grounds and the riders that ride the horses, come not only from the State of Louisiana, but from many states other than Louisiana; and that the same horses and same riders compete at tracks in meets in states other than Louisiana. There is over $1 million in ticket sales per day at the fair grounds, over $10 million prize money per year, and one million bets per day are placed. There are 26 concession

stands, there is a full service restaurant, and all of these sell all kinds of food, including beer, hamburgers, cigarettes, hot dogs, liquor, soft drinks, and so on. The patrons that attend the track come from many states other than Louisiana, most of them are tourists, many of them are tourists and; lastly, this track, the fair grounds, leases equipment from American Totalisator, which is an out-of-state corporation that leases equipment to many other similar tracks across the country.

And in these circumstances, Your Honor, we believe that the defendants' motion for summary judgment should be denied.

THE COURT: Well, it is clear from the cases cited by both parties that the National Labor Relations Board has declined to exercise its ddiscretionary jurisdiction over horse racing as an industry. The Court has given it a great deal of study. The issue is whether the Federal Court has jurisdiction over an industry where the NLRB has declined such,

As you say, there are no Fifth Circuit or Supreme Court cases on point to give us any guidance. The plaintiffs, as you just said, has Stein vs. Mutual Clerks Guild, 560 Fed 2d 486 cited by the First Circuit in 1977, and that Court held it had jurisdiction in the horse racing industry under the Labor Management Reporting and Disclosure Act, despite the fact that NLRB failed to exercise its jurisdiction over the industry.

Now, the plaintiff notes that the definition of "industry affecting commerce" in the NLRMDA is almost indistinguishable from the definition of the same in the Labor Management Relations Act.

The Court held in the case, that's the Stein case, that "coverage by the Board is not as sine qua non for jurisdiction under the NLRMDA." That's at page 490.

I am giving all this extenso, because I figure there will be an appeal on it.

That Court did not, however, discuss the relevance of coverage by the Board to the Labor Management Relations Act, and the Stein case has not been cited in any Fifth Circuit opinions.

Now, there is a Southern District of Florida District Court case which is almost factually identical to the case at bar, an independent association of pari-mutual employees versus Gulf Stream Park Racing Association at 407 Fed Sup 855, decided in 1976.

The employees of a track ought to be able to compel their employer to comply with their collective bargaining agreement and submit to a dispute in arbitration.

The Court discussed plaintiff's claim whether or not the fact that the Board had not asserted jurisdiction over the industry was relevant as to whether this employer affected commerce. See page 856.

The Court noted to the NLRB two reasons for determining horse and dog racing do not have such a substantial affect on commerce to have warranted the exercise of jurisdiction. The first was that the operations of such tracks are essentially local in character; so that a labor dispute therein is not likely to disrupt interstate commerce.

The second reason was that refusal by the Board

to assert jurisdiction would not leave the labor relations of these operations unregulated; rather Congress has provided that the individual states, as Mr. McCloskey said, could assume jurisdiction in such a situation.

Race tracks are already subject to details of state regulations, which could be extended to include labor relations, and the Court discussed the NLRB decisions declining jurisdiction over the racing industry in cases where State Courts have asserted jurisdiction over labor disputes where the Board had declined jurisdiction. The Court concluded that if it were to make an independent determination of the particular track, it would merely be reconsidering the factors that led to the Board's conclusion that racing tracks do not affect commerce. It therefore yielded to the expertise of the Board and held that horse racing was an industry of essentially local concern.

The Court found the disputes should be resolved in the State Court and granted defendant's motion to dismiss.

The Fifth Circuit did not hear the action and the only case citing Gulf Stream Park is a Ninth Circuit case which cited it in a footnote, NLRB vs. Anthony Company 567 Fed 2d 695, a footnote to it, a 1977, by the Ninth Circuit Court of Appeals.

Hornbook in its law book discusses this problem. He noted there is a range of employment enterprises which the Board could constitutionally regulate, but has refrained from doing so. The problem of having a no man's land, that is an area where the NLRB had declined to regulate an industry, but where the states were barred from regulation, was remedied by congressional action in 1959. State or territorial courts or agencies were given power to assert

jurisdiction over labor disputes where such jurisdiction was declined by the NLRB.

Now I cite Gorman basic text labor law, 1976, on page 26. The Louisiana Supreme Court has taken jurisdiction cases where the NLRB has declined jurisdiction.

In New Orleans, Opera Guild vs. Local 174, 134 So2d 901, a 1961 case, the Court took jurisdiction over a case where the NLRB had in the majority of cases declined jurisdiction over labor disputes involving theatrical and musical entertaining.

As to the specific industry of horse racing, the Louisiana Third Circuit Court of Appeals has considered whether the state should exercise its jurisdiction in this area. The Evangeline Downs, Inc., 191 So2d, a Louisiana Appeals case in 1976, the Appellate Court declined to assert jurisdiction, finding the area preempted.

The Court stated that it would not assume jurisdiction over a particular dispute until the Board has declined to assert its basic preempted jurisdiction in the particular dispute in question. However, as both plaintiff and defendant point out in their memorandum, the NLRB in its Rule 103 point 3, effective as of April 17, 1973, stated "It will not assert its jurisdiction in any proceeding under Sections 8, 9 and 10 of the Act involving the horse racing and dog racing industries." That's 38 Federal Register 907. Therefore, the Evangeline Downs decision would probably not control.

Now, although the NLRB decision not to assert jursidiction over the horse racing industry is not, I repeat, not binding on this Court, it would seem that the Board has

thoroughly considered the issue and has consistently held, and in fact has passed specific rules to the effect that horse racing does not affect interstate commerce to the extent that interstate commerce would be greatly affected by a labor dispute in this arena, in this area.

Now, this Court believes that the Florida District Court case, Gulf Stream Park, should be followed. This Court should defer to the expertise of the Board and hold that horse racing is an industry of essentially local concern and, therefore, this action should be dismissed.

Plaintiff, of course, still has recourse in the State Court system to seek its relief.

The motion for summary judgment is granted. I bid you adieu to the Fifth Circuit Court of Appeals.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Eastern District of Louisiana.

I further certify that the foregoing, pages 1 to 11, is a true and correct transcript of the proceedings had in the above-entitled cause and that said transcript is a true and correct transcription of my stenographic notes.

Dated at New Orleans, Louisiana, this 22nd day of June, 19l82.

/S/PATRICIA L. McGEE
Official Reporter